IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 65 OF 2005

Madhukar Laxman Kulkarni. ... Appellant.

Versus.

Jivan Madhav Kulkarni. ... Respondent.

Shri G.R.Rege with Smt.S.A.Mudbidri for the Appellant.

Shri U.B.Nighot with Shri Abhijit Kadam for the Respondents Nos.1 & 11.

CORAM : ABHAY S. OKA, J.

DATED : 2nd February, 2005.

P.C.:

1. Heard the learned Counsel appearing for the parties. The Appeal is preferred by the unsuccessful Plaintiff in the suit for specific performance of the agreement executed on 17th May 1972. The Courts below have declined to grant decree for specific performance in favour of the Appellants in a suit filed in the year 2000 for enforcing the agreement executed in the year 1972. The Courts below have held that the Appellant is not entitled to protect his possession under section 53A of the Transfer of Property Act, 1882. However, the trial Court granted a limited decree in favour of the Appellant restraining the Respondent from dispossessing the Appellant otherwise than by due process of law and the Appellate Court has not interfered with the said part of the Decree.

2. In so far as the relief of specific performance is

concerned, it is to be noted here that the suit was filed in the year 2000 for enforcing the agreement executed in the year 1972. The agreed consideration in the year 1972 was Rs.4500/- and even according to the case of the Appellant he had paid a sum of Rs.4000/- to the Respondent. Considering these facts, no fault can be found with the approach of the Courts below when decree for specific performance was refused in a suit belatedly filed in the year 2000.

3. The learned Counsel appearing for the Appellant submitted that the only reason given by the Appellate Court for coming to the conclusion that the Appellant was not ready and willing to perform his part of the agreement was that the Appellant failed to issue any notice calling upon the Respondent to perform his part of the agreement by applying for sale permission to the Competent Authority. He submitted that there was no requirement in the terms of the agreement that such notice should be served upon the Respondent and therefore, merely because notice was not issued, it cannot be held that the Appellant was not ready and willing to perform his part of the agreement. It is true that in paragraph 11 of the Judgment, the Appellate Court has noted the fact that the Appellant did not give any notice to the Respondent. However, apart from that the Appellant Court has recorded a finding to the effect that :

> ".....From the evidence of the Plaintiff and the documents no inference can be gathered from the evidence that any attempts have been made by the Plaintiff in respect of performing his part of the contract. It is also clear from the record that the Plaintiff has not given any notice against the Defendants showing that he is ready and willing to perform his part of the contract."

Therefore, it is crystal clear that considering the evidence on record, the Appellate Court has recorded a finding that the Appellant has not made any attempts to perform his part of the agreement. It is pertinent to note here that it is not the case of the Appellant that at any point of time he offered to pay the balance consideration of Rs.500/-. Taking the terms of the agreement as it is, a conveyance was to be executed within maximum period of seven years from the date of execution of the agreement i.e. on or before 17th May 1979 and no case is made out that the Appellant any time offered to pay the balance consideration and called upon the Respondent to obtain sale permission and convey property in favour of the Appellants.

4. Hence no fault can be found with the finding of fact recorded that the Appellant was not ready and willing to perform his part of the contract and therefore, he is

not entitled to the benefit of section 53A of the Transfer of Property Act, 1882.

5. The possession of the Appellant has been protected by the trial Court and the Appellant cannot be dispossessed unless the Respondent takes recourse to the provisions of law and files appropriate proceedings against the Appellant. No substantial question of law arises in the Second Appeal. The Second Appeal is dismissed with no order as to costs.

Judge.